IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.16 of 1995

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1. Kuleshwar Yadav Son of Govind Yadav

2. Bali Yadav Son of Govind Yadav

3. Razia Devi W/o Govind Yadav, residents of village Manohar Chak, P.S. Mohanpur (Barachatty), District Gaya.

... ... Appellants

Versus

The State of Bihar

... ... Respondent

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Appearance :

For the Appellants : Mr. Ashok Kr. Choudhary, Sr. Advocate

For the State : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH
and
HONOURABLE MR. JUSTICE SHAILENDRA SINGH

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 11-11-2022

The present criminal appeal has been preferred in the year 1995 i.e. 27 years ago against the judgment of conviction and the order of sentence dated 12.12.1994 passed by the learned Sessions Judge, Gaya in Sessions Trial No. 612/90 (arising out of Barachatty P.S. Case No. 122/87, G.R. case No.2778/87), whereby and whereunder the appellants have been convicted under Section 302 of the Indian Penal Code and sentenced to undergo R.I. for life.

2. It is the case of the prosecution as narrated by the informant (P.W.1) in his fard beyan dated 31.10.1987 that owing to the land dispute, the sons of his brother Govind Yadav, namely, Kuleshwar Yadav and Bali Yadav used to threaten him regarding the partition of land even though the matter was already decided with the aid of Panch. The informant further alleged that the maternal uncle of Kuleshwar Yadav and Bali Yadav, namely, Narayan Yadav and Prabhu Yadav called Kuleshwar Yadav, Bali Yadav, Nado Yadav and Rajo Yadav and hatched a plan to kill the informant, after which they sent Kuleshwar and Bali to village Manoharchak for this purpose. The informant further stated that on 30.10.1987, when the informant was washing his mouth at his *darwaja*, appellant Kuleshwar Yadav caught hold of him and appellant Bali Yadav started assaulting him with *chapda* and said that 'cut his head'. Thereafter, the mother of both accused persons, namely, Razia Devi took garasa and lathi from the house and gave *garasa* to Kuleshwar and kept lathi with her and started assaulting him. Then informant started shouting, upon which his wife Rampati Devi came and fell down on the body of informant but the accused persons did not spare her and continued assaulting the informant along with his wife even in fallen condition with the help of *garasa*, *lathi* and *chapda*. Both started

shouting but due to fear, the villagers were not coming and all three accused persons were abusing and were saying that anyone who will come in rescue will be killed. Thereafter, their son, namely, Basudeo Yadav got terrified after seeing the informant and his wife in injured condition and rescued himself inside the house and closed the door. Upon hue and cry made by Basudeo Yadav, the villagers, namely, Pokhan Yadav, Somar Yadav, Siri Yadav and other persons of the village came and saved them. The informant further stated that until he was alive, he saw three persons in front of him and thereafter he and his wife got unconscious. The informant further stated that he did not know when he was brought to Mohanpur Government Hospital.

3. On the basis of fardbeyan, Barachatty P.S. Case No.122/87 was registered under sections 324, 307, 323/34, 120(B) of the Indian Penal Code and investigation was taken up. In course of treatment, wife of the informant, namely, Rampati died whereafter Section 302/34 of the Indian Penal Code was added.

4. After investigation, the police submitted charge-sheet and cognizance was taken by the Jurisdictional Magistrate and thereafter the case was committed to the Court of Sessions.

Charges were framed against the appellants to which the appellants pleaded not guilty and claimed to be tried.

5. During trial, the prosecution examined altogether fourteen witnesses, namely, Jageshwar Yadav (P.W.1), Dr. Arjun Singh (P.W.2), Kunti Devi (P.W.3), Somar Mahto (P.W.4), Siri Yadav (P.W.5), Pokhan Yadav (P.W.6), Chhathu Yadav (P.W.7), Dr. Farasat Hussain (P.W.8), Basudeo Yadav (P.W.9), Mahesh Ram (P.W.10), Kamal Nain Yadav (P.W.11), Bholi Yadav (P.W.12), Santan Prasad (P.W.13) and Arjun Sharma (P.W.14). In support of its case, the prosecution has also produced exhibits as Ext. 1 (fardbeyan), Ext. 2 (post mortem report), Ext. 3 (injury report), Ext. 1/1 (signature of Basudeo Yadav on fardbeyan), Ext. 4 (formal F.I.R.), Ext. 5 (signature of Kamal Nayan Yadav on the carbon copy of *surtehal*), Ext. 5/1 (signature of Bholi Yadav on the carbon copy *of surtehal*), Ext. 6 (discharge ticket of Jageshwar Yadav), Ext. 7 (certificate regarding receiving of dead body), Ext. 8 (OPD entry No. 2451 of Mohanpur Hospital), Ext. 8/1 (OPD entry No. 2452 of Mohanpur Hospital), Ext. 9 and 9/1 (two bed head ticket of Govt. Hospital, Mohanpur). After conclusion of the trial, the learned Trial Court convicted and sentenced the appellants in the manner indicated above.

6. Learned counsel for the appellants has submitted that the judgment and the order under challenge are bad in the eye of law as the learned trial court has not appreciated the evidence available on the record. Learned counsel has pointed out that there are no specific allegations against all the three appellants of causing injury upon the deceased in the fard beyan of the informant. The learned counsel in furtherance of his argument submitted that the prosecution in an endeavour to improve its case materially has made specific allegation against the appellants in the deposition of the witnesses but has failed to prove its case and, therefore, as a result of failure of the prosecution to prove the specific allegation against the appellants, the offence under Section 302 of the Indian Penal Code cannot be attracted. The learned counsel also submitted that without the aid of Section 34 of the Indian Penal Code, the conviction of the appellants cannot be sustained and falls palpably in the eyes of law. In addition to the aforesaid arguments, learned counsel argued that the deceased succumbed to death after 20 days of the incident and, as such, death has taken place due to secondary haemorrhage and not caused due to primary haemorrhage, as a result of which Section 302 of the Indian Penal Code is not attracted. The learned counsel

lastly submitted that the prosecution has not been able to prove the place of occurrence beyond all reasonable doubts.

7. Learned A.P.P. for the State has submitted that the judgment of conviction and order of sentence under challenge requires no interference as the prosecution has been able to prove its case beyond all reasonable doubts. From the evidence, which has been adduced by the prosecution, the guilt of the appellants is satisfactorily proved and there is no infirmity in the judgment of conviction and order of sentence rendered by the trial court.

8. After hearing the arguments advanced by the learned counsels appearing for the parties and perusing the materials available on record, following issues arise for consideration in this appeal:-

(I) Whether the cause of death of the deceased is directly associated with the act of the appellants?

(II) Whether the prosecution has been able to prove the place of occurrence beyond all reasonable doubt?

(III) Whether the cause of death is directly associated with the act of the appellants i.e. to say whether the death has taken place due to primary haemorrhage or secondary haemorrhage?

9. Now coming to the first issue, from perusal of the fard beyan of the informant and deposition of the prosecution

witnesses it appears that initially the case of the prosecution as per the fard beyan of the informant was that the deceased was assaulted by all the three appellants. Further, the informant in his fard beyan has not mentioned any specific allegation of assault against any of the appellants. However, later on the prosecution has materially improved its case which would be evident from the perusal of paragraph 5 of deposition (cross examination) of the informant (P.W.1) and in paragraph Nos.1 and 2 of deposition of P.W.9. In their depositions an attempt to materially improve the prosecution story has been made by attributing specific allegation against the appellant Kuleshwar Yadav and Balli Yadav for inflicting a garasa injury on the head and inflicting *chapda* injury on the abdomen of the deceased respectively. Likewise, P.W.3 has also made specific allegation against the appellants Kuleshwar Yadav and Balli Yadav for assaulting the deceased. From the bare reading of the fard beyan, it appears that the informant has not stated anything about her presence as an eye witness at the place of occurrence at the relevant point of time. Therefore, it would be unsafe to rely upon the deposition of P.W.3 in so far as the allegation of assault is concerned. From the totality of the facts of the case, it is evident that the witnesses are not consistent in their version and the case of the prosecution suffers from glaring

infirmities and material improvement. The learned trial court has convicted all the appellants under Section 302 of the Indian Penal Code without taking aid of Section 34 of the I.P.C. In order to bring home the guilt under Section 302 of the Indian Penal Code simpliciter, we would like to refer to the law settled by the Hon'ble Supreme Court in ***Dhaneswar Mahakud and others Versus State of Orissa*** reported in (***2006) 9 SCC 307***, wherein the Hon'ble Court in paragraph 8 observed the following :

> *"8. Before we consider the eye-witnesses' version of the incident and the medical evidence, we would like to venture upon the argument advanced by the counsel for the appellants that whether in the absence of a charge under Section 34 IPC the accused-appellants can be convicted with the aid thereof, when they were charged with an offence under Section 302 read with Section 149, IPC only. To convict the accused of an independent charge under Section 302 IPC, it is necessary that the Court should reach to the conclusion that the injuries inflicted by each individual taken in isolation, were sufficient in the ordinary course of nature to cause death of deceased persons. If the Court reaches to the conclusion on the 'basis of the material placed before it that the injuries were sufficient in the ordinary course of nature to cause death and the nature of injuries was homicidal, the Court can convict each and every accused under Section 302 IPC, but if the Court cannot conclusively reach to the finding that each and every individual involved in commission of the offence has caused such injuries which are sufficient in the ordinary course of nature to cause death, the accused cannot be convicted under Section 302 IPC. If the injuries caused are sufficient in the ordinary course of nature and they have been caused in furtherance of the common*

> *intention, then each and every individual propagating the common intention can be convicted under Section 302 read with Section 34, IPC, although he has not been charged under Section 34 IPC and has been charged under Section 149 IPC along with Section 302 IPC."*
>
> *(Emphasis supplied)*

Now coming to the facts of the present case the prosecution in its entire case has not alleged any allegation of specific assault against appellant no.3. So far appellant no.2 is concerned, although initially there is no specific allegation against him however during course of trial by way of material improvement an allegation of assaulting the deceased on her abdomen has been attributed against him. From perusal of the post-mortem report (Ext.2) it appears that the doctor has opined that death has been caused due to toxemia, shock, sepsis and pressure over vital part of the brain. Therefore, so far the injury attributed to have been caused by the appellant no. 2, namely, Bali Yadav is concerned, the same cannot be said to be a fatal or homicidal injury. Now applying the principle as laid down in the case of ***Dhaneswar Mahakud (supra)*** the prosecution in this case has failed to prove an independent charge under section 302 I.P.C simpliciter against each of the appellants. There is no sufficient material available on record which could have brought the learned trial court to conclusively reach to the finding that each injury as attributed

against the appellants are sufficient in the ordinary course of nature to cause death of the deceased. Thus, the learned trial court has erred in convicting each of the appellants under Section 302 of the I.P.C without taking aid of Section 34.

10. Now adverting ourselves to the second issue, from the perusal of the fard beyan it appears that there is only one place of occurrence where the incident is said to have taken place. The place of occurrence as narrated in the fard beyan is the d*arwaja* of the informant where he alongwith his wife was assaulted by the appellants through *lathi, garasa, chapda*. But from the perusal of the deposition of the informant, there is a material improvement in the story of the informant, which is evident from the reading of paragraph 1 and 2 of examination-in-chief, that a there are two place of occurrence, one is the *darwaja of the informant*, where he was washing his mouth when the appellants are said to have cased assault on his person and his wife, who is said to have come to the place after hearing the voice of the informant and tried to protect him. Thereafter the wife went to the *angan* of the house, where the appellants have assaulted her person. It further appears from paragraph 5 of the deposition (cross-examination) of the informant, where he has categorically stated that he went into the state of unconsciousness after seeing the blood which was spilled

in the *angan*. But P.W.9, who claims himself to be an eye witness to the said incident has deposed, with respect to the first place of occurrence, in paragraph 2 of his deposition (examination-in-chief) that, he was at the *darwaja* of his house and his father was at *the darwaja of a dalan* which is at the distance of 20 feet from the *darwaja* and at that place the fight occurred. Thereafter, the deceased and the informant came to angan and the appellants assaulted them. The witness categorically deposed that the entire incident of assault on the persons of the informant and the deceased took place at angan. From the bare reading of the deposition of P.W.10, the Investigating Officer of the case, it appears that the witness has mentioned two place of occurrence wherein in paragraph 3 of his deposition (examination-in-chief) he has stated about the first place of occurrence as pagdandi, from the east of which there is darwaja of the house of the informant and at that darwaja he saw lot of blood. In paragraph 8 of his deposition (cross-examination), he mentioned about second place of occurrence, which is the angan wherein he did not find any blood. Further the defence has made a suggestion to the informant in paragraph 7 of his deposition (cross examination) in relation to the place of occurrence which was denied by the informant. However, the informant has not explained the reasons for such

material improvement made by him in his deposition in relation to the place of occurrence, which creates doubt in relation to happening of the incident of assault at such place. At this juncture, we would like to rely upon the judgment of ***Pohlu vs. State of Haryana*** reported in ***MANU/SC/1148/2004,*** wherein the Hon'ble Supreme Court in paragraph No.11 has observed the following :

> *"11. P.W. 2 Sukhdei has alleged in the F.I.R. that the occurrence took place near the village chaupal in which Hukam Chand, the deceased, was assaulted. Before that the Appellants and Ors. had entered her house, assaulted her and thereafter proceeded towards the chaupal. While disposing in Court, she has attempted to change the place of occurrence by stating that she was assaulted in the sahan of her house and Hukam Chand was assaulted just outside her house. Counsel for the State has shown to us the site plan from which it appears that the place where Hukam Chand is alleged to have been assaulted is only three steps from the main door of the house of the informant. Counsel for the Appellants submitted that this has been done deliberately, because the material on record does disclose that a different occurrence took place near the chaupal in which the son of the informant, namely, Dharamvir, was also involved. However, with a view to prevent the emergence of*

truth, the prosecution has shifted the place of occurrence and also not examined Dharamvir, son of the informant, who was also involved in that incident. What is apparent, however, is that P.W. 1 has sought to shift the place of occurrence where Hukam Chand is said to have been assaulted. Though, according to her, she was assaulted inside the house in the sahan and some blood had dropped in the sahan, and her clothes had also got bloodstained, the Investigating Officer has categorically stated that he did not find blood at any place either at the alleged place of occurrence or in the sahan or on the clothes of the informant. Moreover, this witness named only three accused persons in the F.I.R. Later she added the name of Prem Singh, and in the course of deposition in Court she also implicated Raj Kumar. These facts lead us to hold that she is not a wholly reliable witness on whom the Court can place implicit reliance."

Therefore, in the light of material contradictions arising from the deposition of P.W.1, P.W.9 and P.W.10, we firmly believe that the prosecution has miserably failed to prove the place of occurrence beyond all shadow of reasonable doubt.

11. Before we advert ourselves to the third issue, we would like to expound the medical jurisprudence with respect to death

caused due to Primary Haemorrhage, Secondary Haemorrhage and their relation with the nature of wound sustained by the deceased. The lexicographical meaning of Haemorrhage, Primary Haemorrhage and Secondary Haemorrhage is given in "Butterworths MEDICAL DICTIONARY" (2nd **Edn., 1978),** which is quoted herein below:

> *"Haemorrhage: Bleeding; the escape of blood from any part of the vascular system.*
> *Primary haemorrhage: That occurring immediately after injury.*
> *Secondary haemorrhage: Haemorrhage occurring 7-10 days after injury or operation and usually attributed to infection."*

In addition to the definition quoted hereinabove, we also find it important to refer to MODI'S MEDICAL JURISPRUDENCE AND TOXICOLOGY (21st Edn., 7th Reprint 1996, at p. 280) which defines Primary and Secondary Haemorrhage as :

> *"Haemorrhage occurring immediately after an injury is known as primary while delayed haemorrhage which occurs after several hours or days is known as secondary."*

In the realm of medical knowledge and its literature, it has been elucidated that death of a person can be caused due to

several reasons, but for the sake of relevance and brevity, we would like to limit ourselves only to the death of a person caused by secondary haemorrhage. The medical opinion with regard to cause of death finds its succinct elaboration in Parikh's Textbook of Medical Jurisprudence and Toxicology (3rd Edn., 1979, at p. 323) :

"*SECONDARY CAUSES OF DEATH*

The secondary causes of death are: infection; crush syndrome; thrombosis; embolism; secondary shock; and other indirect results of the injury. Death may also result from previous disease accelerated by the injury; supervention of a new disease; consequences of operative interference; or to neglect or wilful disobedience on the part of the patient.

Infection

All wounds may become infected to a lesser or greater degree depending upon the rapidity and efficiency of treatment, the virulence of the infecting organism and the resistance of the host. The infection may result in (a) local sepsis or septicaemia and pyaemia (b) infective processes in the internal organs (c) necrosis or sloughing of parts, and (d) tetanus.

> *Septic infection: In abrasions, the infection may merely result in local sepsis or a spreading cellulitis. In septic complications such as septicaemia and pyaemia, the spread of infection from the injury must be traced and it should be remembered that bruising without breaking the surface skin may lead to infection.*
>
> *(Emphasis supplied)*

Lastly, we would like to dwell upon the relation between death and secondary haemorrhage, which is elucidated in LYON'S MEDICAL JURISPRUDENCE FOR INDIA (10th Edn., 1953, at p. 222) :

> *"Wounds on the Living : Is the Wound Dangerous ? ...Danger to life depends, primarily, on the amount of haemorrhage, on the organ wounded, and on the extent of shock; secondarily, on secondary haemorrhage, on the occurrence of septicaemia, erysipelas, tetanus, or other complications..."*
>
> *(Emphasis supplied)*

Now we advert ourselves to the facts of the case in hand and from perusal of the post-mortem report of the deceased, it appears that the deceased suffered the following injuries :

> (i) Infected wound 2"x3/4"x bone deep over vertex on scalp. On opening the cranial cavity subdural haematoma was present.
>
> (ii) On removing the bandage from abdomen healed scar of right paramedian incision upon

> which stiches removedis found. On opening the abdomen sanguineous fluid was present. Part of large intestine was gangrenous. Intestines were adherent with liver and between coils itself. Liver was lacerated at several places. Stomach was partially filled with bloody fluid.

Further, the doctor opined that the death has occurred due to toxemia, shock, sepsis and pressure over vital part of brain. While considering the argument put forth by the learned counsel for the appellants, we have given our anxious consideration for examining that whether the cause of death, in this case, can be directly attributable to the injury allegedly caused by the appellants, in the backdrop of the fact that the deceased died after 20 days of the alleged occurrence. In addition to the delay of 20 days, it is also pertinent to take note of the fact that P.W.2, (doctor, who conducted post-mortem of the deceased), in the post-mortem report has found an infectious wound on the scalp. Further, part of the larger intestine was also found to be gangrenous. One of the causes of death of the deceased in the opinion of the doctor is sepsis. Thus, on the basis of the aforesaid discussions, we reach to the conclusion that the cause of death of the deceased is not directly associated with the act of the appellants.

At this moment, we would like to refer to the judgment of the Hon'ble Supreme Court rendered in the case of ***B.N.Kavatakar and Ors. vs. State of Karnataka***, reported in ***1994 SCC (Crl) 579***, observed the following:-

> *"9. The next question that comes up for our consideration is what is the nature of the offence that the appellants have committed. The Medical Officer who conducted autopsy on the dead body of the deceased has opined that the death was as a result of septicaemia secondary to injuries and peritonitis. As we have indicated above, the deceased died after five days of the occurrence in the hospital. On an overall scrutiny of the facts and circumstances of the case coupled with the opinion of the Medical Officer, we are of the view that the offence would be one punishable under Section 326 read with Section 34 IPC."*
>
> *(Emphasis supplied)*

In the present case also, the question, which arises for consideration, is whether the cause of death is directly associated with the act of the accused. As indicated above, the medical evidence goes on to show that the wounds sustained by the deceased got infectious and caused sepsis and gangrene. The doctor in paragraph 6 of his deposition (cross examination), has stated that *'life could have been saved if proper treatment would have been made as there was sufficient time'*. Therefore, in the totality of the circumstances of the present case, it cannot be said

with certainty that the deceased died only on account of the injuries allegedly given by the appellants. Further, the death of the deceased appears more probably to be caused by the secondary haemorrhage, as a result of infections mentioned in post-mortem report. Hence, in light of the settled precedent of Hon'ble Supreme Court in ***B.N.Kavatakar (Supra)***, the act of the appellants would not attract the offence under Section 302 of the Indian Penal Code, but at best Section 326 of the Indian Penal Code could be attracted. However, in light of the issue decided above, wherein the prosecution has failed to prove the place of occurrence beyond reasonable doubt, the allegation making an offence under Section 326 of the Indian Penal Code also stands falsified.

12. In view of the findings arrived at on the issues formulated above, particularly in the light of failure of prosecution to prove the place of occurrence beyond all reasonable doubt, we are of the considered opinion that the prosecution has failed to prove the charge framed against the appellants and, therefore, the conviction of the appellants cannot be sustained.

13. In the result, the present criminal appeal is allowed. The judgment of conviction and the order of sentence dated 12.12.1994

passed by the learned Sessions Judge, Gaya in Sessions Trial No. 612/90 (arising out of Barachatty P.S. Case No. 122/87, G.R. case No.2778/87) is set aside. Since the appellants are on bail, they are discharged from the liabilities of their respective bail bonds.

(Sudhir Singh, J)

(Shailendra Singh, J)

Narendra/-

AFR/NAFR	AFR
CAV DATE	
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